U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 15Nov2002

CASE NO.: 2001-LHC-2861

OWCP NO.: 1-134993

In the Matter of:

PAUL J. HANDLEMAN
Claimant

v.

ELECTRIC BOAT CORPORATION
Employer

APPEARANCES:

Scott Roberts, Esquire
For the Claimant

Edward W. Murphy, Esquire

For the Respondent

BEFORE: The Honorable Gerald M. Tierney

Administrative Law Judge

DECISION AND ORDER -AWARDING BENEFITS AND GRANTING 8 (F) RELIEF

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§§§901, et seq., (hereinafter the "LHWCA"), and the regulations promulgated thereunder.

I. PROCEDURAL HISTORY

On January 16, 1996 the Claimant in the above-captioned matter filed an Employee Claim for Compensation. The Claimant requests permanent total or in the alternative, permanent partial disability benefits for an injury he sustained on September 11, 1995.

A formal hearing was held on February 7, 2002, in New London, Connecticut. The record was thereafter left open until April 30, 2002, for three purposes.

At the conclusion of the formal hearing, a supplemental report concerning 1995 wage statistics was permitted to be submitted by Respondent's vocational expert witness, Ms. Susan Delf and Final Arguments were set to be due on June 1, 2002. [1]

On March 1, 2002, Respondent submitted a Motion to Reopen the Trial Record in order to admit into the record EX 19, a report by Claimant's treating doctor, Dr. John Giacchetto which discussed Claimant's work capacity, a primary issue in this case. The motion was subsequently granted. Thereafter, Claimant's counsel filed a Motion to Allow the Trial Record to Remain Open until May 30, 2002, which was also granted on April 29,2002, via telephone.

On March 28, 2002, a deposition was received by this Court. This was the last filing in the case.

II. STIPULATIONS

1. This claim is covered by the Longshore and Harbor Workers' Compensation Act.

2. On September 11,1995, Claimant Paul Handleman's leg and hip were injured.

3. An employer-employee relationship existed at this time.

4. Claimant's injury arose within the scope and course of his employment.

5. Respondent was timely informed of Claimant's injury.

6. An informal conference was held on July 18, 2001.

7. On July 26, 2001, Respondent filed a timely controversion.

8. Medical benefits in the amount of $ 37, 384.61 were paid.

9. Claimant was paid temporary *total* disability from October 3, 1995 to June 4, 2001, at the rate of $389.54 per week, totaling $116, 416.81. Claimant's benefits were then reclassified as temporary *partial* disability benefits and reduced to $9,571.20 for the period beginning
May 8, 2001, and ending July 15, 2002.

10. Claimant's average weekly wage is $584.32.

III. ISSUES

1. Whether Claimant is partially or totally permanently disabled.

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[1] I have marked the 1995 report as EX 21.

2. Whether Claimant still possesses wage earning capacity.

3. Whether Respondent is entitled to Special Fund Relief pursuant to Section 8(f) 33 U.S.C. §§§§901.

IV. SUMMARY AND ANALYSIS

A. BACKGROUND

On September 11, 1995, Paul J. Handleman (hereinafter "Claimant") was employed by Electric Boat (hereinafter "Respondent") as a painter and cleaner. While on the premises, Claimant tripped and fell, injuring his *left* leg and hip (Tr. 6). He began experiencing lower right extremity pain and subsequently had surgery (EX 7).

B. EVIDENCE

1. Claimant's Testimony

Claimant first testified on direct examination that at age 17, he dropped out of highschool because of his poor performance academically as well as his desire to earn money (Tr. 19-20). Claimant stated that he thereafter worked for two employers and was never injured during this time (Tr. 19-20, 22-23,29).

In 1973, however, while employed by King Sealey Thermos, Claimant testified that he was in a serious motorcycle accident, was treated for this injury at Norwich Orthopedic Group by Dr. Tom Masterson and underwent surgical repair on his *right* knee and leg (Tr. 24-25, 27-28). Due to the nature and extent of this injury, he stated that he lost his job at King Sealey Thermos and began receiving Social Security Disability Benefits which he received for approximately 10 years (Tr. 28-29).

Claimant subsequently worked as a truck driver and machinist. There is no record of any physical injury during this period (Tr. 30-34).

Claimant then began to work for Respondent as a second shift painter and cleaner (Tr. 36). Prior to the commencement of this employment, he stated that Respondent gave him a physical exam which he passed (Tr. 37). Claimant said that at the initial interview, he told Mr. Winston, Respondent's interviewing employee, that he was unable to climb a ladder but also provided a doctor's opinion which contradicted this claim (Tr. 38-39,40).

During the first three or four years of employment with Respondent, Claimant had no problems with his *right* leg, until he slipped on ice and fell off a gangway on Respondent's premises, landing on his *right* side (Tr. 43). He slipped on ice a second time, but failed to report either incident. (Tr. 44-47). He treated with Respondent's on-site nurse where he was given aspirin, an ice or a heating pad and was sent back to work each time (Tr. 44).

Claimant testified that he sustained a third work injury to his *left* leg on September 11, 1995 (Tr. 43,52). As on the two prior occasions, he sought treatment from Respondent's on-site nurse but this time, he refused to go back to work because of intensified pain. He then began treatment at Norwich Orthopedic Group (Tr. 48-49). He was treated by Dr. Pasternak. and was later referred to Dr. Giacchetto by Respondent (Tr. 49-50). Dr. Giacchetto preformed surgery and gave him numerous injections for pain (Tr. 51-52).

The Claimant feels that he cannot return to work because of his September 11, 1995 injury (Tr. 36-37). He has varying degrees of pain which are unpredictable; on good days there is less pain and more ability to work, and on bad days there is more pain and less ability to work (Tr. 56).

Claimant is able to pick up weight, climb 8 to 10 stairs with a railing, and work for eight hours if he is not experiencing pain but, he is unable to walk carrying weight or stand for eight hours (Tr. 56-57, 61, 62,). He explained his interests and abilities as follows: his left leg is more bothersome than his right; he has difficulty grocery shopping, walking approximately 100 feet, sitting; using his left leg, operating standardized vehicles, spelling, and reading; he takes pain medication everyday and elevates his leg when it is bothersome; he has a shoe lift and walks with a cane; he is beginning to develop arthritis and; he is interested in photography and computers (Tr. 52, 54,55, 57-59,64-68).

Claimant explained that a typical day in his life consists of going to a doughnut shop to eat breakfast, using his computer and then watching TV in his recliner for the remainder of the day (Tr. 70-71).

Claimant works with Ms. Patty Boettcher, a vocational expert who fills out job applications for him, goes to job sites with him and has helped him put his resume together (Tr. 53, 65). Ms. Boettcher told him that he should inform potential employers that due to his injuries, he is unable to walk far distances and if hired, he may not be able to guarantee that he will be in attendance everyday because of intermittent pain (Tr. 56-57, 65).

Claimant stated that Ms. Boettcher assisted him in applying to Mystic Color Lab, Mortegan Sun and Wall Mart for visual security positions (Tr. 65-66). He also applied for a position as a cage cashier. However, Claimant explained that he did not sufficiently research what each job physically or mentally entailed (Tr. 63). The Claimant said that there were requirements of each position that are beyond his capabilities (Tr. 64).

In response to job recommendations by Respondent's vocational expert, he claimed they would cause him trouble. Specifically, he would not be able to drive a car with a standard gear shift and could not consistently walk the distances required (Tr. 67-68).

During cross examination, the Claimant testified to the following physical and mental characteristics, abilities and limitations: he sat in the witness chair for an hour; can walk for approximately 20 minutes and can drive a car for one-half to one hour without pain; he has a GED degree which he claims his wife took the test for him and; he can use a computer 4 to 5

hours at a time. He said that he could preform part of the security work and some other full time work depending on the conditions. The Claimant has no emotional or psychological problems. He visits a physician regularly for assessment (Tr. 72-90).

2. Testimony of Ms. Susan Delf, Respondent's Expert Witness

On direct examination, Respondent's vocational expert, Ms. Susan Delf, testified that she has spent 11 years as a vocational counselor and has an extensive curriculum vitae pertaining to this particular field of study (Tr. 100). As a vocational counselor, she explained that she accesses the abilities and limitations of a particular employee and tries to find a job opportunity to match those particular abilities and limitations (Tr. 101).

She conducted two labor market survey reports for the Respondent. The first market survey report, performed in 2001, involved sampling different types of jobs, contacting employers and taking into account Claimant's physical limitations (Tr. 102, 105-107, 110). This report listed 9 positions which would be available to Claimant and would pay approximately $8.00 to $15.00 per hour (Tr. 106-107).

A second market report survey in January 2002 was done to reflect a psycho-educational evaluation of Claimant performed by Dr. Christopher C. Tolsdorf. The jobs listed were in the $ 6.50 to $ 8.12 pay range. It took into account the fact that Claimant had difficulty spelling, reading and writing and the and the functional capacity evaluations of Dr. Giacchetto and Dr. Santoro (Tr. 108-111, 114). Dr. Giacchetto limited Claimant to a four hours work day if he is provided a one-half hour break to stand or walk. He found him able to lift 30 pounds and drive (Tr. 110). Dr. Santoro's report found the Claimant capable of working 8 hours of sedentary work per day (Tr. 111).

After reviewing Claimant's record, his deposition transcript, the report of Ms. Boettcher, trial exhibits and personally observing Claimant in the court room, Ms. Delf's opinion is that Claimant still possesses residual earning capacity (Tr. 108-109). She further stated that her opinion is based upon her education, training and is within a reasonable degree of certainty (Tr. 114-115). In support, she mentioned that the Claimant is sociable, has various types of work experience, is successful, is interested in different professions, is able to use the Adobe computer program, and is physically capable of performing the jobs listed in her general labor market survey (Tr.104-105, 115).

When questioned by counsel on cross examination, Ms. Delf admitted that the 2001 market survey was compiled before Dr. Tolsdorf's psycho-educational evaluation, that she ignored Dr. Giacchetto's four hour work restriction in recommending primarily full time work and she was unable to calculate an exact salary figure (Tr. 118, 125,126). She admitted that the 2001 labor market survey contained *2001* statistics rather than *1995* figures. She could provide 1995 figures only from the minimum wage figures from the Longshore website (Tr. 119).

Although she visited some job sites, she had no idea what the parking lots looked like, she was not aware if there was handicapped parking or whether there were stairs or how long it would take to drive to these specific job locations. She did not know the physical compositions

of the parking lots, she did not know what type of floor Claimant would have to work on and for some positions, she was not aware of how long Claimant would have to stand and in one instance, she was unaware that the parking lot had a gravel surface which would cause difficulty for Claimant (Tr. 119-138).

During redirect examination, Ms. Delf informed the Court of the 1996 wage figures were $5.10 to $6.37 per hour (Tr. 149). However, on recross, Ms. Delf acknowledged that the 2002 survey did not contain the same jobs as the 2001 survey because Claimant's intellectual evaluation and physical evaluations were used as additional information to form the 2002 survey. She also admitted that the jobs listed in the 2001 survey may not be presently available (Tr. 151).

3. May 7, 2002 Deposition of Dr. Vincent Santoro, Respondent's Expert Witness (EX 22)[2]

Dr. Vincent Santoro, a Board certified orthopedic surgeon, stated that he examined the Claimant for approximately 20 to 25 minutes. He found that the Claimant has a capacity to work 8 hours of sedentary work per day. Dr. Santoro also examined the list of jobs recommended for the Claimant in the labor market surveys and concluded that the Claimant is physically capable of performing all of them with the exception of the truck driver position. Dr. Santoro stated that he was not certain that "I'd think he was safe enough to be driving unless they could really modify the truck or car..." In addition, he stated that the Claimant could work as a security guard if it is solely a monitoring situation and he is not required to preform any other types of tasks.

Dr. Santoro testified on cross examination that if he had treated the Claimant after his 1973 motorcycle accident, he would have limited his physical exertion but he believed that all of the physical work required by an employee of Respondent (climbing, squatting, crawling, and ladder use) would not have posed a problem to Claimant at that time. [3]

4. Supplemental Report of Ms. Susan Delf, Respondent's Expert Witness (EX 21)

Ms. Delf, a vocational consultant, submitted wage statistics for 1995 for the employment positions listed in the 2001 and 2002 labor market surveys. The statistics in 2001 are as follows: Mystic Color Lab paid an employee approximately $8.00 to $10.00 per hour; Cooper's Photo Imaging paid $8.00 per hour; Kellogg Marine Supply's hourly wage was $8.00 to $10.00; City of New London Police Department compensated it's employees $15.12 per hour; employees at Ryder Truck Rental yielded an hourly wage of $8.48; EG&G Technical Services's employees received an hourly wage of $9.00 to $10.00; Martland Health Care paid $7.25 to $7.75 per hour; Bennett Security paid $7.00 to $8.00per hour; Pinkerton Security's employees were compensated $8.00 per hour; Wal Mart paid $6.50 per hour; Cross Sound Ferry's hourly wage was $8.00 per hour and; Foxwoods Casino paid $8.12 per hour.

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[2] I have marked this deposition as EX 22.

[3] Claimant had a Sampson rod implantation operation performed (Tr. 16).

In 1995, these same positions paid approximately the following wages: Mystic Color Lab's employees were compensated $6.33 to $7.90 per hour; Cooper's Photo Imaging paid $6.33 per hour; Kellogg Marine Supply's hourly wage was $6.33 to $7.90; City of New London Police Department's employees received $11.96 per hour; Ryder Truck Rental paid $6.71 per hour; EG&G Technical Services wages were $7.12 to $7.90 per hour; Martland Health Care paid $5.48 to $5.86 per hour; employees at Bennett Security yielded $5.29 to $6.05 per hour; Pinkerton Security paid $6.05 per hour; Wal Mart's rate of compensation was $4.92 per hour; Cross Sound Ferry's rate was $6.05 per hour and ; Foxwoods Casino paid their employees $6.14 per hour.

5. Exhibits

April 10, 2001 Correspondence to Claimant from Respondent (CX3).

This letter informed Claimant that on April 24, 2001, his Temporary Partial benefits would be reduced to $149.55 per week in accordance with the March16, 2001 labor market survey which estimated that there were 9 positions available to him in his geographical area, paying approximately $8.00 to $15.12 per hour. [4]

Claimant's Medical Records for the Period of August 23, 1973 through April 2, 1996 (CX4).

The records contained in this exhibit objectively show the Claimant's medical condition improving over time after the 1973 motorcycle injury. A letter dated, March 11, 1981, stated that on July 30, 1980, Claimant was permitted by Dr. Thomas J. Masterson, M.D., to use "full weight on his operated extremity".

Dr. Daniel T. Glenney's Exhibits (EX2, EX6).

On May 23, 1995, Dr. Daniel T. Glenney, M.D., indicated that the Claimant was employed by Respondent and was complaining of pain in both of his legs, especially the right. Due to this pain, the Claimant reported that he was missing approximately one day per week of work. Dr. Glenney further stated that the Claimant was disabled as of September 18, 1995, and instructed him not to return to work for three days. In addition, he provided the Claimant anti-inflammatory medications and restricted his physical activities (EX2).

Thereafter, Dr. Glenney by letter dated, April 2, 1996, stated that the abovementioned three day resting period was directly related to Claimant's 1995 work-related injury. However, he said that "the need for rod removal, total hip arthroplasty, and total knee arthoplasty are not, in my opinion, the direct result of the work-related injury of September 11, 1995." He concluded

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[4] The Claimant earned approximately $30,385 annually or $584.32 weekly while employed by Respondent as a painter. However, after his 1995 work-related injury, Respondent paid him annual temporary total disability benefits in the amount of $18,698. Thereafter, these benefits were reduced to $7,777 annually or $149.55 weekly due to Respondent's 2001 market report survey and Dr. Giacchetto's work restriction report which indicated that Claimant still possessed earning capacity (CX 9).

that the need for these surgeries resulted from the Claimant's 1973 motorcycle accident." (EX6).

Dr. John J. Giacchetto's Exhibits (CX 5, CX 9, EX 10-11, EX 14-15).

There are approximately 31 medical records contained in CX5 which were written by Dr. John J. Giacchetto, M.D., dated, May 29, 1996 through January 7, 2002. These records discussed the Claimant's prior medical history and concluded that based upon Dr. Giacchetto's findings and the American Medical Association's Guide to the Evaluation of Permanent Impairment, there was a 15% loss to Claimant's left knee. Furthermore, Dr. Giacchetto stated that 50% of Claimant's present injury resulted from his 1995 work-related accident and the remaining 50% of the injury, resulted from his 1973 accident. In addition, Dr. Giacchetto documented the Claimant as "fully disabled", noted that he was "cane dependent", had episodic and a considerable degree of pain and limited him to "sit down work only" (CX5).

On May 29, 1996, Dr. Giacchetto stated that the Claimant complained of lower right extremity pain from the hip and knee, is now beginning to experience pain at rest and believes that his weight gain has contributed to his present condition (EX7).

Dr. Giacchetto's May 19, 2000 letter and December 22, 2000 diagnosis stated that the Claimant reduced his pain medication intake and may be able to work in the future if successful surgery is completed. He restricted Claimant to sit down work only (EX 10, EX 11).

Dr. Giacchetto subsequently wrote two letters dated August 2, 2001, and September 7, 2001, which classified the Claimant as "permanently partially disabled" and limited him to an 8 hour day of sedentary work. In addition, he stated that the Claimant will become progressively worse in the future and he should be reevaluated in 4 months (EX 14, EX 15).

However, on November 5, 2001, after reevaluation of the Claimant, Dr. Giacchetto limited him to a 4 hour work day consisting of 3 and 1/2 hours of sedimentary work and 1/2 hour of standing or walking. Also, he permitted the Claimant to lift approximately 30 pounds of weight and drive but disallowed him from operating heavy equipment (EX16).

Dr. Christopher Tolsdorf's Psycho-Educational Evaluation of Claimant (CX6).

On May 23, 2001, Dr. Christopher Tolsdorf, Ph.D., ABPP/ CN is a Diplomate in Clinical Neuropsychology and conducted a psycho-educational evaluation on the Claimant which revealed that the Claimant has weak verbal skills and strong mechanical skills. He predicted the Claimant to be functioning at a third grade level and stated that he is practically illiterate. Therefore, Dr. Tolsdorf recommended that the Claimant avoid employment involving reading and writing. Furthermore, he explained that Claimant is only comfortable working with his hands and machinery, operating trucks and equipment and using the computer. According to Dr. Tolsdorf, Claimant is not competent to perform office related work, jobs which require helping people or jobs which require creativity. He concluded that the Claimant is able to work in a photo lab, as a security guard, drive a cab, operate some sort of machine or he may be able to do light assembly

work.

Correspondence and Assessment Reports for the Period of April 13, 2001 through November 16, 2001, from Ms. Patricia Boettcher (CX 9).

Ms. Boettcher a vocational counselor with Allied Community Resources, Inc., stated that after working with the Claimant and having an opportunity to personally observe him, she is of the opinion that he is capable of working 4 hours of sedentary work per day. Furthermore, she stated that the Claimant "will require a very flexible, part time position in which he can attend work if he feels good, but will not be able to attend if his pain is too great." She explained that he continues to experience pain and should avoid stairs. According to Ms. Boettcher, the Claimant is capable of working in a photo lab as a finisher or working as a light assembler, but is physically unable to work as a security guard.

Dr. Herbert S. Pasternak's Exhibits. (CX 10, EX 5).

EX 5 and CX 10 contain medical reports from Dr. Herbert S. Pasternak of Orthopedic Associates of Hartford, P.C. Dr. Pasternak discussed the Claimant's medical history and stated that after personal examination of the Claimant, he is of the opinion that the Claimant's 1995 work-related injury on Respondent's premises was a 5% contributing cause to his current disability. He explained that this injury was the "final straw which caused the injury to become severe." Furthermore, Dr. Pasternak said that the Claimant's work-related injury "precipitated the severe pain that has precluded his being unable to work."

Dr. Thomas J. Masterson's June 7, 1996 Letter (CX11).

Dr. Thomas J. Masterson, M.D., concluded that the Claimant's 1995 work-related injury was a 5% contributing cause to his present disability. Moreover, Dr. Masterson is of the opinion that if the Claimant was not subject to the physical stresses of work which was required by Respondent, then he would not have experienced the medical problems that he is experiencing today until approximately age 60. [5]

Dr. Glenn Dubler's November 28, 1995 Letter (EX 4).

Dr. Glenn Dubler, M.D., stated that the Claimant is "capable of limited standing and walking." Furthermore, he is of the opinion that the Claimant's preexisting motorcycle injury combined with his 1995 work-related injury to cause a materially and substantially greater injury. According to Dr. Dubler, the Claimant's 1995 work-related injury merely worsened his preexisting motorcycle injury.

Ms. Lori J. L. Wall's Letter from the Norwich Rehabilitation Center (EX 8)

Ms. Lori J. L. Wall, a physical therapist for the Norwich Rehabilitation center, evaluated

[5] Claimant is currently 50 years old.

the results of the Claimant's functional capacity and blankenship system behavioral profiles and concluded that the Clamant is functionally able to work 4 hours per day. She stated that he passed six out of eight validity criteria tests during the functional capacity evaluation but, noted that this test could be unreliable and other factors such as Claimant's personality traits and the possibility that he misunderstood the self report pain scales should be taken into account (EX9).

EX 9- Dr. John P. Fulkerson's April 7, 2000 Medical Evaluation Letter

Dr. John P. Fulkerson, M.D., described Claimant as a 50 year old man with bilateral knee pain. He said that the Claimant informed him that he began experiencing problems with his right knee approximately 5 years ago and problems with his left knee, three years ago. Furthermore, Claimant told him that he was currently taking pain medication.

After physical examination of the Claimant, Dr. Fulkerson concluded that the Claimant has medial meniscus tears. However, according to Dr. Fulkerson, Claimant is overweight and should discontinue taking Percocet in order to possibly be rehabilitated.

Primary Life Insurance Company Attending Physician's Statement of Disability (EX 12).

This March 15, 2001 report explained that Claimant has not recovered and is limited to sit down work only.

Ms. Susan Delf's Exhibits (EX 13, EX 20, EX 21)

Ms. Susan Delf, Respondent's expert, is a vocational consultant and has an extensive background in this field. She conducted two labor market surveys taking into account the Claimant's particular limitations. The first survey dated, March 16, 2001, described the Claimant as an overweight individual who needs to use a cane in order to walk, sit and stand. This report stated that according to a prior functional report performed on Claimant, he can lift 20 pounds occasionally and 10 pounds frequently, walk and stand occasionally, sit and reach frequently and he is not restricted in hand function. However, he may not bend, squat or kneel and is restricted to light duty work (EX 13, EX21).

Ms. Delf noted that Claimant has been attending Weight Watchers for approximately 10 months. However, he may have a problem with his thyroid gland which may be the reason why he has been unsuccessful in losing weight. Also, the Claimant tries to walk in order to loose weight but must do this in the morning because he begins to feel greater pain later in the day and must then take pain medication. He may drive but given his shoe lift, he must cross his left leg over his right to step on the brake (EX13).

Despite the Claimant's physical restrictions, the 2001 survey explained that he is able to work in the general labor market including customer service, dispatching, sales and basic office and telephone operator. He possesses good social skills, and memory for background detail. Also, according to Ms. Delf, there are 9 jobs, paying approximately $8.00- $15.12 per hour, in which the Claimant would be physically capable of preforming (EX13).

Ms. Delf conducted second labor market survey on January 23, 2002. She stated that after review of all of Claimant's relevant records, she is of the opinion that the Claimant is able to perform any one of the 6 jobs listed in the survey which pay ranges from $6. 50 to $8.12 per hour (EX 20).

Mr. Paul Handleman's Resume (EX 17).

Claimant's resume indicated that he previously worked as a painter, laborer, truck driver and boatswain's mate in the military.

Dr. Vincent M. Santoro's Exhibits (EX 18, EX 19).

At the request of Respondent, Dr. Vincent Santoro, M.D., conducted an evaluation of the Claimant. He discussed the Claimants medical history, the cause of the his present condition and concluded that the Claimant is restricted to sit down work only and should begin a weight reduction program (EX 18, EX 19).

Miscellaneous Exhibits.

In addition to the above mentioned exhibits, the Claimant offered CX 1, CX 2, CX 7, CX8, and CX 12, which I do not find relevant to the instant claim. CX 1 consists of an LS-203 form and correspondence to the Department of Labor stating that Mr. Roberts would be representing the Claimant.[6] CX 2 is a September 11, 1995 health net print out. CX 7 is comprised of correspondence from Claimant's counsel to vocational experts describing the Claimant and requesting assistance. CX 8 contains correspondence and vocational reports which inform Claimant's counsel of various procedural guidelines of the Office of Worker's Compensation he must follow. Finally, CX 12 contains operative reports from the William Backus Hospital of Norwich, Connecticut dated, September 26, 1996, and July 11, 2000, which describes the results of two operations preformed on the Claimant.

Similarly, the Respondent submitted exhibits which I do not find material to the outcome of this case. EX1 is a report by Dr. Thomas Masterson, dated September 4, 1975, which discusses the Claimant's medical condition in 1975. EX3 is a treatment note from Dr. Herbert Pasternak which recommended that the Claimant postpone sampson rod removal surgery.

C. NATURE AND EXTENT OF THE DISABILITY

There are four different categories of disabilities and different methods of compensation for each. The categories of disabilities include temporary total, temporary partial, or permanent total and permanent partial.

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[6] An LS-203 form is a standardized Employee Claim for Compensation dated January 16, 1996.

(a) Permanent Disability Distinguished from Temporary Disability

A *permanent* disability is disability which a does not normally recover in a normal healing period but, instead, continues for an indefinite duration. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, *pet. for reh'g denied sub nom. Young & Co. v. Shea*, 404 F.2d 1059 (5th Cir. 1968) (*per curium*), *cert denied*, 394 U.S. 876 (1969). A disability is classified as "permanent" if after it is determined that a claimant has reached maximum medical improvement, he or she still has a residual disability. *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56, 60 (1985). However, all disabilities the claimant has before it has been determined that he has reached maximum medical improvement are categorized as *temporary* disabilities. *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984).

The determination of maximum medical improvement is a question of fact and only medical evidence must be taken into account. *Ballesteros v. Willamette Western Corp*., 20 BRBS 184, 186 (1988). Maximum medical improvement is reached when the condition of Claimant becomes stabilized. *Cherry v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 857 (1978); *Thompson v. Quinton Enterprises, Limited*, 14 BRBS 395, 401 (1981). According to *Trask* 17 BRBS 56, 60 (1985), maximum medical improvement is determined to be the date in which medical evidence shows that although claimant has received a substantial amount of medical treatment, his condition will not improve in the future.

Based on the foregoing, I find that the medical evidence in this record and Claimant's credible testimony established that the Claimant reached maximum medical improvement on the date he filed suit. The evidence demonstrated that Claimant possesses a residual disability which will continue for an indefinite period. Claimant testified that after his injury on Respondent's premises, he was unable to go back to work because of intensified pain (Tr. 48). Furthermore, Claimant sought the treatment of various doctors and underwent numerous surgical procedures. (Tr. 35-37, 49-51) Claimant also explained to the Court that all of his various physical limitations and restrictions are not improving (Tr. 52- 69). In addition, Dr. Pasternak stated that Claimant's work related injury was the "final straw which caused the injury to become severe." Furthermore, he states that " his fall on 9/11/95 (the work related injury) precipitated the severe pain that has precluded his being unable to work." (EX5) Moreover, in EX 14 &15, Dr. Giacchetto classified Claimant as "permanently disabled" and stated that Claimant will only become progressively worse in the future. Therefore, I find that Claimant is classified as "permanently" disabled.

(b) Total Disability Distinguished from Partial Disability

A *prima facie* case of *total* disability is established if Claimant proves that he cannot return to his usual work. *Ramirez v. Vessel Jeanne Lou, Inc*., 14 BRBS 689 (1982). Employer then has the burden of demonstrating that suitable alternative employment exists for the Claimant. *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. See Tac Alaska Shipbuilding v. Director, OWCP*, 8 F. 3d 29 (9th Cir. 1993). The alternative employment must be realistic job opportunities the particular claimant is capable of performing taking into account the his age, education, work experience, and physical restrictions. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F. 2d 1031 (5th Cir. 1981). If such is shown, the Claimant's

classification as *totally* disabled will then be reduced to *partially* disabled. *See,* eg., *Container Stevedoring Co. v. Director OWCP*, 935 F.2d 1544 (9th Cir. 1991); *Dove v. Southwest Marine of San Fransico, Inc.*, 18 BRBS 139 (1986).

In the case at bar, Claimant has established a *prima facie* case of total disability. The physical duties Respondent required Claimant to perform a painter and cleaner included cleaning the floors and walls and painting from approximately 4:00 p.m. until 12:00 a.m. (Tr. 41). Claimant's resume indicated that he previously worked as a painter, laborer, truck driver and boatswain's mate in the military (EX17). All of these jobs required physical labor (Tr. 20-21, 30, 33, 34, 35). Claimant has now shown that after the September 11, 1995 work-related accident, he has difficulty walking and sitting and standing (Tr. 58, 59, 61), walks with a cane and shoe lift (Tr. 65-66), has difficulty driving (Tr. 67) and takes pain medication everyday (Tr. 57). In addition, Dr. Giacchetto and Dr. Santoro stated that Claimant is limited to sit down work only and the Claimant credibly stated that he was not presently physically capable of preforming any of the aforementioned jobs (EX 10-11, EX 18-19, Tr. 35-37).

Furthermore, Claimant is limited to a 4 hour a day work restriction by Dr. Giacchetto. Despite the fact that Dr. Santoro stated that he was able to work an 8 hour workday, I find Dr. Giacchetto's opinion is more credible because his opinion is consistent with Claimant's credible testimony, the opinion of Dr. Pasternak and the weight of the other evidence (Tr. 111, EX 22). Dr. Pasternak said that the Claimant was precluded from work because of severe pain (CX 22, EX 5). In addition to Dr. Giacchetto, Ms. Patricia Boettcher, a vocational counselor, and Ms. Lori J. Wall, a physical therapist of the Norwich Rehabilitationon Center, concluded that the Claimant is capable of working four hours per day (CX 9, EX 8). Ms. Boettcher stated that after working with the Claimant and having an opportunity to personally observe him, the Claimant "will require a very flexible, part time position in which he can attend work if he feels good, but will not be able to attend if the pain is too great." (CX 9). Similarly, Ms. Wall stated that the Claimant is functionally able to work four hours per day according to the Dictionary of Occupational Titles, U.S. Department of Labor, 1991 (EX 8).

Next, it must be determined whether Respondent has rebutted Claimant's *prima facie* showing of total disability. In an attempt to show suitable alternate employment, Respondent has introduced two labor market surveys dated, March 16, 2001 and January 23, 2002 which were marked as EX 13 and EX 20 respectively. Respondent also provided expert testimony regarding such employment. These surveys indicated that the Claimant could work as a Photo Technician, Photo Specialist, Billing clerk, Dispatcher, Rental Sales Representative, Data Clerk, Communications Operator, Focus Representative, Shuttle Dispatcher, Security Guard, Greeter, Ticket Agent, and Shuttle Bus Driver. (EX13, EX20).

I find that the Claimant is capable of performing six of the fifteen positions listed in the market survey, taking into account his mental and physical limitations. He is able to work as an Assembler at Martland Health Care, a Photo Technician at Mystic Color Labs, a Photo Specialist at Cooper's Photo Imaging, a Greeter at Wal Mart, a Ticket Agent at Cross Sound Ferry or a Security Guard because they involve sedentary work, working with your hands and machinery, or using a computer. Further, they require a minimal amount of reading, writing and spelling. Expert testimony and Claimant's testimony confirm this position. According to the Dr.

Tolsdorph's psycho-educational evaluation, Claimant has strong mechanical skills, is comfortable in working with his hands and machinery and using the computer (CX6). Dr. Tolsdorf stated that the Claimant "may be able to work in a photo finishing lab where he can learn to operate the equipment and process photographs." (CX 6). Also, Dr. Giacchetto is of the opinion that Claimant is physically capable of working on a part time basis of four hours per day if the job is restricted to sit down work only (CX9). Moreover, Ms. Delf, Respondent's vocational expert, indicated that Claimant is capable of performing some although not all of the jobs listed in these surveys to a reasonable degree of certainty (Tr. 114-115). Also, Ms. Delf explained that Claimant is considered to be sociable, interested in various professions, presents himself well, and has post secondary training (Tr. 104-105, 115). In addition, the Claimant testified that he is able to use a computer for four to five hour increments and Ms. Boettcher concluded that he was able to work in a photo lab or as a light assembler (Tr. 72-90).

He is also able to work as a security guard. Dr. Santoro said that the Claimant would be able to do so if the position only required the Claimant to monitor screens (EX 22). Because Dr. Santoro is a medical doctor and Ms. Boettcher, who expressed a contrary opinion, is a vocational counselor, I am affording more weight to the opinion of Dr. Santoro concerning the Claimant's physical capabilities. Furthermore, Ms. Delf's 2002 labor market survey stated that as a security guard at Bennett Security Service, Claimant would not be required to lift or write and would only be expected to preform video monitoring and a foot patrol "every two hours". Similarly, the security position at Pinkerton Security stated that it was a "desk position". In addition, Dr. Tolsdorf stated that the Claimant "may do well as a security guard, especially if it involves watching TV monitors."

However, I find that the Claimant is unable to preform the Billing Clerk, Police Dispatcher and Data Clerk positions because they involve working with reading, writing and spelling. As previously stated, Dr. Tolsdorf said that the Claimant is not suited preform office related work, or preform jobs which require reading, writing or creativity (CX 6). Furthermore, Dr. Tolsdorf's psycho-educational evaluation stated that Claimant has difficulty spelling, is practically illiterate and possesses an education which is equivalent to a third grader (CX6). Also, as previously stated, the evaluation explained that Claimant is only comfortable using the computer, working with his hands and machinery and operating trucks and equipment (CX6).

Additionally, I find that the Claimant's 4 hour work day restriction precludes him from working as Rental Sales Representative at Ryder Truck Rental, a Data Clerk at EG&G Technical Services and a Focus Representative, Shuttle Dispatcher or Communications Operator at Foxwoods Casino, because these jobs are listed in the market survey as full time positions. As I have stated, I have found that Claimant is medically restricted to a four hour work day based upon Claimant's credible testimony, medical records and expert opinion which clearly indicate that his onsets of pain are unpredictable and sporadic and that he has trouble sitting, walking and climbing stairs (Tr. 56, 58-59, 62). Therefore, I find that the positions of Rental Sales Representative at Ryder Truck Rental, Data Clerk at EG&G Technical Services and Focus Representative, Shuttle Dispatcher and Communications Operator at Foxwoods Casino are not suitable alternate employment.

Likewise, I find that the Claimant is physically unable to work as a truck driver. Although

Ms. Delf and Dr. Tolsdorf concluded that the Claimant is capable of preforming such work, Dr. Santoro stated in his May 7, 2002 deposition that he physically unable to do so (EX 22). Dr. Santoro stated that he would not be sure if the Claimant "would be safe enough to be driving unless they could really modify the truck or car..." (EX 22) Furthermore, I find that the opinion of Dr. Santoro more credible than Ms. Delf's and Dr. Tolsdorf in accessing the physical limitations of the Claimant because he is a medical doctor who personally examined the Claimant. Ms. Delf however, is a vocational counselor who sampled different types of jobs, contacted employers and took into account Claimant's physical limitations (Tr. 102,105-107,110). Further, Dr. Tolsdorf , PH. D., ABPP/ CN is a Diplomate in Clinical Neuropsychology and conducted a *psycho-evaluation* of the Claimant (CX 6). In addition, the Claimant testified that he is able to drive for one-half to one hour before he experiences pain (Tr. 72-90).

Claimant had the opportunity to rebut the finding of suitable alternate employment by actually applying for employment at job sites the survey listed. However, Claimant has failed to submit any documentation of him doing so and has lost this opportunity.

Based on the above discussion, I find the Claimant's evidence more persuasive, logical and in depth. I find that the record as a whole supports the finding that Claimant is Partially and Permanently Disabled. The Respondent has rebutted the presumption that Claimant is totally disabled by establishing through various expert testimony that there are six available jobs for Claimant. The Benefits Review Board has adopted the view that "it is the worker's inability to earn wages and the absence of alternative work that renders him *totally* disabled, not merely the degree of physical impairment." *Palumbo v. Director, OWCP*, 937 F. 2d 70, 76 (1991). Thus, I find that the evidence reveals that Claimant is not totally unable to earn wages and that there is possibility of alternative work.

C. WAGE EARNING CAPACITY

Permanent partial disability benefits for non scheduled employees are calculated under Section 8(c)(1)-(20) of the LHWCA by subtracting the post-injury wage earning capacity from the average weekly wage at the time of the injury. Section 8(h) of the LHWCA explains how the post-injury wage earning capacity is formulated.

Wage earning capacity is defined as "an injured employee's ability to command regular income as the result of his personal labor." *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 405 (1989) (*citing Larson*, *The Law of Workman's Compensation* §57.51 at 10-164.64 (1987)).

Section 8(h) of the LHWCA states that Section (c)(21) or subdivision (e) of the LHWCA govern the determination a particular injured employee's present wage earning capacity who is classified as partially disabled. Section (c)(21) and (e) require that an employee's "actual earnings if such actual earnings fairly and reasonably represent his wage earning capacity" shall be considered the employees's wage earning capacity figure. However, this section explains that if an employee has no actual earnings or his present earnings do not fairly and reasonably represent his wage earning capacity, then the deputy commissioner may determine the amount of these earnings, taking into account "the nature of the injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his

capacity to earn wages in his disabled condition, including the effect of the disability as it may naturally extend in the future." 33 U.S.C. §908(h).

If it is shown by the respondent that suitable alternate employment exists, then the amount of the alternate employment wages are considered claimant's present wage earning capacity. *Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231, 233 (1984).

The ALJ must establish a precise dollar amount for a particular Claimant's wage earning capacity after his injury by conducting a two part test required by Section 8(h). *La Faille v. Benefits Review Bd.*, 884 F. 2d 54, 61, 22 BRBS 108, 118 (CET) (2d Cir. 1989); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649, 660 (1979). The first step of the test is to determine whether the Claimant's actual wages after the injury are reasonably and fairly representative of his wage earning capacity. *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 796, 16 BRBS 56, 64 (CRT) (D.C. Cir. 1984). The second step is performed only if there are no actual earnings or the judge determines that these wages are not reasonable and fair. *Devillie*r, 10 BRBS at 660.

In order for the judge to decide this precise dollar amount, he must evaluate the suitable alternate employment evidence provided by the respondent as well as any other jobs that the respondent has not mentioned as long as the claimant is capable of performing these jobs. *Mangaliman v. Lockheed Shipbuilding Company*, 30 BRBS 39, 43, (1996). Furthermore, the judge must consider a variety of factors including the claimant's physical condition, age, education, industrial history, the number of hours/weeks actually worked per week/year, and availability of employment which he can perform after the injury. *Abbott v. Louisiana Ins. Guaranty Ass'n.*, 27 BRBS 192 (1993), aff'd, 40 F.3d 122 (5th Cir.1994); *George v. California Stevedore and Ballast Co.*, BRB No.92-2235, 4 (Aug 30, 1996) *(Unpublished)*.

Also, in order to determine the disability award and current wage earning capacity for a Claimant who's prior injury was aggravated by a work-related injury, either the Claimant's actual earnings or his current wage earning capacity are used to find the Claimant's average weekly wage. *Brady-Hamilton Stevedore Co. v. Director, OWCP*, 58 F.3d 419 (9th Cir. 1995).

The goal of the wage earning capacity formula is to figure out what this injured Claimant "would have been paid in the open labor market under normal employment conditions." *Randall v. Comfort Control, Inc*., 725 F.2d 791, 795, 16 BRBS 56, 61 (CRT) (D.C. Cir.1984) (*quoting 2 Larson, The Law of Workmen's Compensation* §57.21, at 10-101 to 10-102(1982) The open labor market is considered to be the market at the place of the injury. *Lumber Mutual Casualty Ins. Co. v. O'Keeeffee (Sinkkila)*, 217 F. 2d 720, 723 (2Cir. 1954).

In the case at hand, I have found Claimant to be Permanently Partially Disabled. Therefore, it is necessary to determine the wage earning capacity of a person in Claimants position. Prior to Claimant's work-related injury, it has been stipulated that Claimant was being paid an average weekly wage $584.32 at the time of injury. Respondent has submitted a supplemental vocational expert report establishing that Claimant would have been earning in 1995 between $4.92 to $7.90 per hour, with the exception of the police dispatcher position which paid

$11.96 per hour. However, as previously noted, nine of the job opportunities the vocational expert listed, I find Claimant is not capable of performing given his physical and mental restrictions. Thus, the positions that I have found that the Claimant is capable of preforming would have paid $4.92 to $ 6.33 per hour, with the exception of the Mystic photo lab technician which paid approximately $7.90 per hour. Therefore, I find that Claimant's post-wage earning capacity is fairly and reasonably represented by $6.00 per hour, for a weekly wage of $240.00 per week.[7]

In view of the foregoing, I find that Claimant's compensation is equal to $346.32. This amount is arrived at by subtracting Claimant's average weekly wage of $584.32 and Claimant's Post-injury wage earning capacity of $238.00 according to Section 8(f).

D. SPECIAL FUND 8(f) RELIEF

Pursuant to the Provisions of 33 U.S.C. §908(f) and 20 C.F.R. §702.321, Respondent petitioned for Special Fund Relief in order to limit its liability of compensation to Claimant.

Section 8 (f) is a mechanism whereby the liability of the employer for permanent partial and permanent total disability and death benefits may be shifted to the Special Fund when a Claimant's disability is not solely due to the injury which is the subject of the claim. In order to be eligible for 8 (f) relief, the employer must show that (1) Claimant had a pre-existing permanent partial disability before the most recent injury; (2) the pre-existing disability was manifest to the employer; and (3) depending on whether the present disability is total or partial, (a) the present permanent total disability was not solely due to the most recent injury; or, (b) the present permanent partial disability is "materially and substantially greater than that which would have resulted from the most recent injury alone without the contribution of the preexisting permanent partial disability." *Two "R" Drilling Co., OWCP,* 894 F.2d 748, 750 (5th Cir. 1990); *Director, OWCP v. Newport News Shipbuilding,* 8 F. 3d 175 (4th Cir. 1993); *Lawson v. Swanee Fruit and Steamship Co.,* 336 U.S. 198 (1949); *McDuffie v. Eller & Co.,* 10 BRBS 685 (1979); 33 U.S.C. §908(f); *Lockheed Shipbuilding v. Director. OWCP,* 25 BRBS 85,87 (CRT) (9th Cir. 1991).

This Section is applicable in situations where an employee sustains a work-related injury

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[7] In order to find the $5.95 figure, I first excluded the sums in the labor market survey which represented the nine positions that I determined the Claimant is unable to preform. I then averaged the rate of pay for each particular job listed if the survey provided two figures representing the pay rate scale. Next I took these six averaged sums and averaged them to arrive at $5.95.

that combines with a pre-existing partial disability, and results in greater permanent disability than would have been caused by the injury alone. *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 1144, 25 BRBS 85(CRT) (9th Cir. 1991). However, the resulting disability must be permanent in nature or this section provides no relief. *Jenkins v. Kaiser Aluminum & Chem. Sales*, 17 BRBS 183, 187 (1985).

An pre-permanent partial disability under Section 8(f) is defined as (1) an economic disability pursuant to 8(c)21; (2) a Section 8(c) scheduled loss; or, (3) a disability which is so serious that a cautious employer would be motivated to terminate the Claimant because of an increased exposure to an employment-related accident and compensation liability. *C&P Tel. Co. v. Director (Glover)*, 564 F. 2d 503, 512, 6 BRBS 399(D.C. Cir. 1997); *overruled by Director, OWCP v. Cargill*, 709 F. 2d 616 (9th Cir. 1983).

In order to satisfy the "manifest " requirement, the Board has held that such requirement will be shown "if prior to the subsequent injury, employer had actual knowledge of the pre-existing condition or there were medical records in existence prior to the subsequent injury from which the condition was objectively determinable." *Esposito v. Bay Container Repair Co.*, 30 BRBS 67, 68 (1996); *Wiggins v. Newport Shipbuilding & Dry Dock* Co, 31 BRBS 142 (1997).

An employer must finally show in cases where a claimant is *permanently partially* disabled, that the claimant's current level of disability is "materially and substantially greater than that which would have resulted from the subsequent injury alone." 33 U.S.C. §908(f); *Lockheed Shipbuilding v. Director. OWCP*, 25 BRBS 85,87 (CRT) (9th Cir. 1991). The employer need only establish that the combination of the employee's prior and subsequent injuries resulted in an i*ncreased* permanent partial disability. *Director, OWCP v. Ingalls Shipbuilding, Inc.*, 125 F.3d at 307. However, this is still subject to the Congressional mandate that it be a "material and substantially" greater level of disability. Id. n. 6; 33 U.S.C. ßß908(f)(1); *Director, OWCP v. Bath Iron Works Corp.[Johnson*], 129 F.3d 45 (1st Cir. 1997).

In order to establish the above mentioned criteria to enable Special Fund Relief, the Respondent makes the following assertions in his July 18, 2001 Petition for relief. The first prong needed to be met by Respondent is to establish that Claimant had a pre-existing disability by using the "Cautious Employer" test. First, Respondent states that Claimant's, when hired by Respondent, had a preexisting injury evidenced by medical records Respondent attached to his petition. Here, Claimant's medical records do show that Claimant had a disability which was existing prior to employment by Respondent. Furthermore, this disability was of a serious nature and such that a cautious employer would been motivated to discharge the disabled employee because of the possibility of an increased risk of injury and compensation liability.

Secondly, Respondent must establish that this disability was manifest to the employer by showing that the employer had actual knowledge of the employee's prior injury or so called constructive knowledge shown by the existence of medical records in which the prior medical

condition could be objectively determined before the claimant's work-related injury occurred. Here, Employer satisfies this prong by attaching objective medical records dated, February 26,1996 and May 29, 1996, which prove that the Claimant sustained a injury prior to his September 11, 1995 work-related injury. Furthermore, these records are consistent with the uncontradicted testimony of the Claimant.

Finally, because I have found that Claimant is Permanently Partially Disabled, Respondent must establish that Claimant's present disability is "materially and substantially greater than that which would have resulted from the new injury alone." In order to meet this burden, Respondent has attached medical records which stated that there is a 5% casual connection between Claimant's present disability and his work-related injury. In addition, I find that the majority of the medical experts have concluded that the Claimant's overall condition was minimally contributed to by his 1995 work-related accident. First, Dr. Sontoro concluded that the Claimant's medical problems were related to his 1973 motorcycle accident and not his 1995 work-related accident (Tr. 7-8). Dr. Pasternak concluded that Claimant's work-related injury on Respondent's premises was a 5% contributing cause to his present disability (CX 9). Likewise, Dr. Masterson found that the 1995 work-related injury was a 5% contributing cause to his present disability (CX 11). Further, Dr. Dubler stated that the 1995 injury does not substantially relate to the Claimant's current disability rather, the work-related injury merely worsened his pre-existing disability (EX 4). In addition, Dr. Glenney stated that "the need for rod removal, total hip arthopasty are not, in my opinion, the direct result of the work-related injury of September 11, 1995." (EX 6). Moreover, the only physician who attached significance to the 1995 work-related injury was Dr. Giacchetto. He determined that 50% of the Claimant's current condition was the result of his motorcycle accident and the remaining 50% related to his work-related accident occurring in 1995. Because all of the opinions agree that the Claimant's disability is the result of a combination of the Claimant's 1995 injury and his prior disabilities, I find that the Respondent has shown the materialness and substantialness of the Claimant's prior accident in relation to his current condition.

In view of the foregoing, I find that Respondent is entitled to the 8(f) Special Fund Relief .

E. ATTORNEY'S FEES AND COSTS

Thirty days are hereby allowed to Claimant's counsel for the submission of an application for representative's fees and costs. *See* 20 C.F.R. §702.132. A service sheet showing that service has been made upon all of the parties, including Claimant, must accompany the application. All parties have fifteen (15) days following the receipt of any such application within which to file any objections to the application.

ORDER

Based upon all of the Findings of Facts, Conclusions of Law, and the record in its' entirety, the following shall be the order of this court.

IT IS ORDERED THAT**:**

1. As a result of the Claimant's September 11, 1995 injury, the Respondent, Electric Boat Corporation, shall pay the Claimant, Mr. Paul Handleman, permanent partial disability benefits. Such benefits shall commence on January 16, 1996, and terminate 104 weeks thereafter.

2. After the expiration of the 104 week period, the Special Fund established in Section 44 of the Longshore and Harbors Workers' Compensation Act, as amended, 33 U.S.C. §§§§901, et seq., shall pay the Claimant continuing permanent partial disability benefits pursuant to Section 8(f) of the
Act.

3. The District Director shall calculate any necessary computations of the abovementioned benefits by utilizing the formula contained in Section 8(h) of the Longshore and Harbors Workers' Compensation Act. This computation shall include a pre-injury average weekly wage of $584.32 and a post injury earning capacity of $238.00. In addition, the District Director shall compute the amount of interest, taking into account the fact that the $238.00 figure was arrived at by using the 1995 figures.

4. Respondent shall receive credit for all compensation that has been paid/or shall be reimbursed by the Special Fund for any overpayments of compensation that have been made.

5. Respondent and/or the Special Fund shall pay interest on overdue compensation pursuant to 28 U.S.C. 1961.

6. The Respondent shall furnish all reasonable appropriate and necessary medical care for treatment of the Claimant's work-related injuries.

7. The Claimant's attorney shall file within 30 days of receipt of this Decision and Order a fee petition. The Respondent shall have 20 days thereafter to object to the petition.

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GERALD M. TIERNEY
Administrative Law Judge